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No. 253

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

PENN FOUNDRY AND MANUFACTURING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Specifications of errors to be urged	10
Summary of argument	11
Argument	17
I. Respondent was not entitled to anticipated profits of $80,000 as damages for breach of contract	18
A. The evidentiary findings do not support the ultimate determination that respondent would have made a profit of not less than $80,000	19
B. The other factors set out in the opinion alone cannot and do not support the judgment	27
II. The Government had the right to terminate respondent's war contract without liability for unearned anticipated profits	35
A. Had a formal contract been issued the respondent, it would probably have authorized the Government to terminate without liability for unearned profits	36
B. Independently of contractual provision, the First War Powers Act authorized the Government to terminate respondent's contract without liability for unearned profits	41
Conclusion	58

CITATIONS

Cases:	
Alexander Wool Combing v. *United States*, 334 U. S. 742	32
Anvil Mining Co. v. *Humble*, 153 U. S. 540	25
Barnes v. *Williams*, 11 Wheat. 415	19
Barrett Co. v. *United States*, 273 U. S. 227	44
Chesapeake Insurance Co. v. *Stark*, 6 Cranch 268	19
College Point Boat Corp. v. *United States*, 267 U. S. 12	43
De Laval Co. v. *United States*, 284 U. S. 61	45
C. W. Denning & Co. v. *Suncrest Lumber Co.*, 51 F. 2d 945	27
Dyal v. *Wimbish*, 124 F. 2d 464	25
Goodyear Co. v. *United States*, 276 U. S. 287	34
Greenwood County v. *Duke Power Co.*, 107 F. 2d 484	27
Haddad v. *Western Contracting Co.*, 76 F. Supp. 987	27
Hathaway & Co. v. *United States*, 249 U. S. 460	20
Hetrick Mfg. Co. v. *United States*, 62 C. Cls. 265	45

Cases—Continued	Page
Howard v. Stillwell and Bierce Mfg. Co., 139 U. S. 199	25, 26
Luckenbach S. S. Co. v. United States, 272 U. S. 533	19, 25
Mahan v. United States, 14 Wall. 109	19
Merritt v. United States, 267 U. S. 338	34
Meyer Scale & Hardware Co. v. United States, 57 C. Cls. 26	45
Newark Sash & Door Co., Inc. v. United States, 107 C. Cls. 606	44
Palmer v. Connecticut Ry. Co., 311 U. S. 544	27
Polar Steamship Corp. v. Inland Overseas Steamship Corp., 136 F. 2d 835, certiorari denied, 320 U. S. 774	26
Pownall v. United States, 334 U. S. 742	32
Prentice v. Zane's Administrator, 8 How. 470	19
Russell Motor Car Co. v. United States, 261 U. S. 514	44, 45
Smoot's Case, 15 Wall. 36	14, 34
Stone v. United States, 164 U. S. 380	19
Suburban Contracting Co. v. United States, 76 C. Cls. 533	26
Sutton v. United States, 256 U. S. 575	34
United States v. Behan, 110 U. S. 338	25, 26
United States v. Berdan Fire-Arms Co., 156 U. S. 552	20
United States v. Causby, 328 U. S. 256	20, 27
United States v. Esnault-Pelterie, 299 U. S. 201; 303 U. S. 26	20, 25, 27
United States v. Minnesota Investment Co., 271 U. S. 212	34
United States v. Pink, 315 U. S. 203	32
United States v. Pope, 313 U. S. 127	20, 27
United States v. Seminole Nation, 299 U. S. 417	20, 27
United States v. Smith, 94 U. S. 214	19
United States v. Wells, 283 U. S. 102	19
White River Levee District v. McWilliams Dredging Co., 40 F. 2d 873	25, 26, 27
Statutes:	
Act of June 15, 1917, 40 Stat. 182	44
Act of May 22, 1939, c. 140, 53 Stat. 752, formerly 28 U. S. C. 288	20
Act of August 7, 1946, c. 864, 60 Stat. 902	18, 46
Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649, 41 U. S. C. 101, *et seq.*)	45
Sec. 1	56
Sec. 6 (d) (5)	45
Dent Act of 1919, 40 Stat. 1272	44
First War Powers Act (Act of December 18, 1941, c. 593, sec. 201, 55 Stat. 839, 50 U. S. C. App. 611):	
Title II	15, 42
United States Code, Title 28, Sec. 1491, formerly 28 U. S. C. 250	34
Miscellaneous:	
American Law Institute, *Restatement of Contracts*, Sec. 331	26
5 Comp. Gen. 450, 455	54

Miscellaneous—Continued Page

87 Cong. Rec. 9838 47

87 Cong. Rec. 9838–9844 47

87 Cong. Rec. 9839 47, 48

87 Cong. Rec. 9840 48

87 Cong. Rec. 9842 47

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Executive Order No. 9023, 7 Fed. Reg. 302 42

Executive Order No. 9055, 7 Fed. Reg. 964 42

Executive Order No. 9058, 7 Fed. Reg. 983 42

Executive Order No. 9269, 7 Fed. Reg. 9265 42

Fain and Watt, *War Procurement, A New Pattern in Contracts*, 44 Col. L. Rev. 127, 194 *et seq.* 30, 48

Goldman, *Termination of War Department Contracts at the Option of the Government*, 42 Michigan L. Rev. 733, 740 39

Hearings before the Subcommittee of the Committee on the Judiciary, H. of Reps., 78th Cong., 2d sess., on H. R. 4789 and S. 1718, pp. 34–35 56

Hearings before the Committee on Military Affairs, H. of Reps., 78th Cong., 1st sess., on H. R. 3022, pp. 22–26, 27–34, 35–37, 43–46, 201, 535, 562 37, 39, 40, 54, 57

Hearings before the Committee on Naval Affairs, H. of Reps., 78th Cong., 2d sess., on H. R. 4469, pp. 1092–1399, 1657 40, 54

Hearings before the Committee on Ways and Means, H. of Reps., 78th Cong., 1st sess., on H. R. 2324, H. R. 2698, H. R. 3015, p. 94 30

Hearings before a Subcommittee of the Committee on Appropriations, Senate, 77th Cong., 2d sess., on H. R. 6868, p. 24 31

Hearings before a Subcommittee of the Committee on Military Affairs, Senate, 78th Cong., 1st sess., on S. 1268, S. 1280, and S. J. Res. 80, pp. 190–191, 194–201, 271, 521–522, 529, 553 37, 39, 51

H. Rep. 1507, 77th Cong., 1st sess., p. 46

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Kramer, *Extraordinary Relief for War Contractors*, 93 U. of Pa. L. Rev. 357 48

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Marbury & Bowie, *Renegotiation and Procurement*, 10 Law and Contemporary Problems 218, 219 32

Miscellaneous—Continued Page

Navy Contract Termination Directive No. 1 of February 28, 1944 40
Navy Department Procurement Directive of July 7, 1943, as amended, Part IV, par. 11401 *et seq* 33, 57
Office of Contract Settlement, *A History of War Contract Termination and Settlements* (July, 1947), pp. 1, 27 ..... 39, 40, 46
Office of Contract Settlement Regulation No. 7, 32 C. F. R. 1944 Supp. 3006.3 (c), p. 3065 ..... 38, 45, 46
40 Op. Atty. Gen. No. 53, August 29, 1942 ..... 48, 49, 50
Opinion of the Judge Advocate General of the Army, SPJGC 1942/164, September 16, 1942, digested in 1 Bull. JAG No. 5, pp. 304–305 53
Opinion of the Judge Advocate General of the Army, SPJGC 1942/160, July 3, 1942 53
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Uniform Termination Article for Fixed-Price Supply Contracts, 9 Fed. Reg. 478–480, 13400 38
War Department Procurement Regulations:
No. 3, par. 3241 39
No. 15 57
War Department Supply Contract Form No. 4 39
War Department Text, *Government Contracts and Readjustment* (J. A. G. S. Text No. 12), pp. 178–179, fn. 50; pp. 159–160, fn. 1 55

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OPINION BELOW

The opinion of the Court of Claims (R. 22–26), is reported at 110 C. Cls. 374.

JURISDICTION

The judgment of the Court of Claims was entered on February 2, 1948 (R. 26). A motion for a new trial, seasonably filed, was denied on June 1, 1948 (R. 27). The petition for a writ of certiorari was filed on August 31, 1948 and granted on November 8, 1948 (R. 27). The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether, in derogation of the legislative and executive policy governing termination of war contracts during World Wars I and II, the Court of Claims may properly award a contractor substantial anticipated but unearned profits, where his contract was cancelled on the same day that the notice of award was received, and before any work had been done, commitments made, or expenditures incurred.

2. Whether the Court of Claims' ultimate "finding" that respondent would have successfully completed the contract at a substantial profit can support its judgment where the findings of the evidentiary or primary facts are directly to the contrary.

STATEMENT

The Court of Claims' findings disclose the following pertinent facts:

In 1911, respondent, a Virginia manufacturing corporation, was incorporated and acquired a plant (at Waynesboro, Virginia), mainly built in 1890, which was equipped with certain machinery and equipment, to which respondent shortly added other used machinery (R. 16–17). From that time until about 1931, the plant was "actively engaged", but since 1931 it has been used for "minor engagements" only, requiring not more than four or five employees. In January, 1941, it had been idle for some years (R. 16–17). At that time, respondent's officers were engaged in other

businesses at or near Pittsburgh, Pennsylvania; one stockholder and director, who had been the plant's local manager when it was in operation and continued to be the company's local manager and statutory agent, was in the real estate business in Waynesboro (R. 17).

With the acceleration of the national defense program, late in 1940 and early in 1941, respondent's officers desired to procure a defense contract and in January 1941, engaged H. M. Johnson as assistant to the president and in February 1942, Gordon Kennedy, an engineer, as general manager (R. 17, 20) (*infra*, p. 7). Throughout the year 1941, Mr. Johnson actively sought a Navy contract for respondent. A conference was held in January 1941; in April, the company submitted a proposal for the manufacture of 500 three-inch 50-caliber gun mounts; sometime before July, it submitted a list of equipment owned by it or deemed available; in July, a representative of the Navy's Gun Mount Section inspected respondent's plant and also talked to Kennedy; in September, at a conference at the Bureau of Ordnance, the company was asked to furnish information as to its financial ability, commitments of subcontractors, and a detailed study of the machine tool operations, predicated upon a possible award of 150 three-inch 50-caliber mounts; on October 7, 1941, respondent submitted additional information; and on December 15, 1941, it slightly modified its previous proposals (R. 17).

At a meeting with the Navy's Bureau of Ordnance, on December 22, 1941, respondent's proposal as to prices, quantities, delivery schedule, payments and options for additional mounts was accepted as satisfactory, and respondent agreed to furnish a letter from a surety company indicating that a performance bond of the nature required by the Navy Bureau of Supplies and Accounts, the contracting agency, would be furnished (R. 17).

Respondent was then given a letter of intent, dated December 29, 1941, confirming the Navy's intent to place an order for the manufacture of 150 gun mounts, two to be delivered in May, 1942, three in June, 1942, five in July, 1942, and thereafter at least ten to be delivered per month. The letter authorized respondent "to purchase materials necessary for the production of the mounts and spare parts and to proceed with the production thereof in anticipation of the placing of the order * * *." If an order were not placed with respondent by April 1, 1942, the Government was to make reimbursement for all costs incurred and to assume all obligations for any commitments made (R. 17–18). This letter of intent was accepted by respondent on January 10, 1942, and then returned to the Navy Department (R. 18). Before this acceptance, respondent had received a Navy letter, dated January 7, 1942, stating that it was understood, pursuant to the agreement reached at the December meeting, that

no expenditures were to be made under the letter of intent "until such time as you furnish a letter from an approved surety company containing a firm commitment to act as surety on a performance bond in the event that a contract is executed" (R. 18).

No letter from a surety company having been received by January 29, 1942, the Navy advised respondent on that day that failure promptly to submit such a letter might result in the termination of the letter of intent. On February 3, 1942, respondent's representative submitted a letter in which the surety indicated that a performance bond in connection with a contract of this size would have to be reinsured and that unless some changes were made in respondent's financial set-up, reinsurance would be declined; but that if respondent accomplished either of two suggested refinancing plans[1] and also furnished certain information as to new key personnel to be engaged by it, reinsurance could be obtained and the surety company would execute the bond. Respondent's representative, who presented this letter to the Navy Department, testified that the official who received it said flatly that it was satisfactory; a

[1] Both the refinancing plans suggested by the surety company involved the investment of considerable additional money by respondent's stockholders. Plan I required, *inter alia*, $100,000 additional working capital and the personal responsibility of the controlling stockholders. Under Plan II, $200,000 additional working capital was to be added; no personal responsibility would then be required.

would probably have adversely affected its profits," the court's opinion cites the following factors as reason for believing that respondent would have made a profit: (a) Kennedy, the production manager, an able man, was willing to work for respondent at "a rather modest salary" ($1,000 per month), but with an arrangement for sharing in the profits (5%); (b) respondent's stockholders, who did not ask for government financing, must have anticipated a profit; and (c) "the consideration and tolerance with which the Government, during the time here in question, treated contractors actually engaged in producing defense material, if the contractor in good faith did his best to perform, is an indication that the plaintiff, if allowed to perform, would probably have succeeded in making a profit." (R. 25–26). Judgment was entered for $80,000 (R. 26).[2]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In disregarding its findings of the evidentiary or primary facts in making its ultimate finding that "If the plaintiff [respondent] had been per-

[2] The court refused to award judgment for respondent on a separate claim, not now involved, for the requisitioning of certain machinery, for which respondent had received payment in return for releases which were claimed below to have been invalid (R. 21–22, 26). Accordingly, the court found it unnecessary to pass upon the Government's counterclaim (R. 14–16), which was concerned solely with the separate claim decided against respondent.

mitted to perform its contract, it would have made a net profit of not less than $80,000." (R. 21).

2. In making an ultimate finding (i. e., that respondent would have made a net profit) which is not sustained by its findings of the evidentiary or primary facts.

3. In failing to make the finding that respondent had not proved that it could have successfully performed the contract and made a profit thereon.

4. In failing to hold that respondent had not proved that it suffered any legal damage from the Government's alleged breach of contract, and was therefore not entitled to recover.

5. In failing to hold that the Government could have properly terminated or cancelled respondent's contract, and that respondent was therefore not entitled to recover any unearned anticipated profits.

6. In awarding respondent a sum on account of unearned anticipated profits.

7. In entering judgment for respondent.

SUMMARY OF ARGUMENT

I

A. The Court of Claims' findings do not support its judgment, awarding respondent $80,000 for loss of anticipated profits. Its evidentiary findings, which alone may be looked to for support of its conclusions, do not support the ultimate finding that if respondent had been permitted to undertake performance of the contract, it would have made a net

profit of not less than $80,000. The contract here required that respondent deliver the first gun mounts within three months, ten gun mounts in the initial five months and thereafter ten a month until the full quota of 150 were delivered. The evidentiary findings show that the construction of gun mounts is difficult and exacting work, and that manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year until they produced their first gun mounts. Hence, even if respondent had the experience, organization and trained mechanics, it probably would not have been able to make timely performance.

But respondent "was not prepared to undertake work of the character proposed by the contract and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts" (R. 19). The court below found that respondent had no experience in the manufacture of gun mounts or in similar work; that it had no manufacturing organization capable of undertaking the work required by the contract; that it had no force of trained employees nor trained personnel to train unskilled employees, although it planned to use about 150 mechanics, skilled, semi-skilled and unskilled in the machining and assembling of the gun mounts; that its plant was not in condition forthwith to be used in the manufacture of gun mounts, in accordance with the award; and that although re-

spondent had planned to subcontract the manufacture of required cast steel forgings, all that it had done in that regard was to contact possible subcontractors. These evidentiary findings leave the court's conclusion that respondent would have performed the contract at a net profit of $80,000 standing bereft of all factual support, plainly overridden by the subordinate findings and therefore not sustainable in point of law. Thus, there is a complete absence of the clear and direct proof, necessary before anticipated profits may be awarded, that the contractor would have complied with its contractual obligations and would have made a net gain which could fairly be estimated without speculation. On the contrary, the subordinate findings conclusively demonstrate that respondent could not have discharged its obligations within the time prescribed by the contract and that it probably would have suffered a substantial loss, rather than earned a 4% profit.

B. The factors mentioned in the opinion of the court below, not only could not be utilized to rectify the deficiencies in the findings but indeed constitute a patently flimsy foundation for its judgment. The willingness of Kennedy (the intended production manager) to work for respondent at $1,000 a month plus 5% of the profit affords no support; there was nothing in the findings or the opinion as to why he decided to work for respondent, and there are any number of possible reasons, apart from the expectation that

government witness testified that he overheard the conversation and that it was to the effect that the letter would be considered to determine whether it was satisfactory (R. 18-19).

Respondent's plant was twice visited, in January and February, 1942, by government representatives. On January 16th and 17th, naval inspectors found no one at the plant except the watchman and the local manager; no work at all was being performed at that time. On February 19, 1942, a War Production Board naval ordnance production specialist found only the watchman at the plant; the local manager was called from his real estate office and accompanied the production specialist in inspection of the plant, and a conference was also had with Mr. Johnson who was called to Waynesboro for the purpose. Reports of both of these visits were given to the Navy Department (R. 19).

The Court of Claims found that on February 19, 1942, the respondent company was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts (R. 19). Respondent's foundry was incapable of producing the cast steel forgings required for the gun mounts. It was respondent's plan, known to the Government, to subcontract for these castings, as well as for other parts of the work. Respondent had contacted certain producers who were willing to

furnish castings and other parts. No actual contracts for castings or for any other parts had been made, but, the court found, there was no reason to suppose that the company could not have obtained these parts from subcontractors (R. 19). For the bulk of its labor supply, respondent expected to obtain former railroad shop mechanics residing near Waynesboro; its plans called for about 150 mechanics, skilled, semi-skilled, and unskilled, in the machining and assembling of the gun mounts (R. 19).

The Court of Claims also found that the construction of gun mounts is difficult and exacting work; that manufacturers experienced in somewhat similar work, with large organizations and trained mechanics, required from seven months to one year from the time of receiving notice to proceed from the Government until the first gun mounts were produced; that respondent had no manufacturing organization and no force of trained personnel to train unskilled employees; and that respondent's proposed general manager (Kennedy) was still, in February, 1942, a regular employee of another company in Ohio (R. 19–20). Kennedy had been assisting respondent in its plans under the expectation that he would sever his connection with the other company and become respondent's general manager; a contract between respondent and Kennedy, engaging him as general manager, was executed on February 24, 1942 (R. 20).

Under date of February 23, 1942, the Navy Department mailed to respondent a notice of award of contract, No. LL96553, for 150 gun mounts, in the amount of $2,087,555; the brief notice of award authorized respondent "to commence performance in accordance with the terms of your proposal," and indicated that a formal contract would later be forwarded for execution (R. 14, 20). This notice of award was received by respondent at Waynesboro on February 24, 1942 (R. 20). On the same day, after it had received the notice of award, respondent received a telegram from the Navy stating "notice of award contract nos. 96553 forwarded in error return for cancellation no award to you * * *" (R. 20.)

This error in sending out the notice of award came about because it was the practice in the Navy Department, after a letter of intent had been issued, for the relevant papers to be sent to the Award Section of the Bureau of Supplies and Accounts, which would—unless notified to the contrary—in due course mail out a notice of award. In this case, the letter of intent of December 29, 1941, was forwarded to the Award Section in routine fashion and that office, not having been informed otherwise, followed its usual practice and sent out the notice of award on February 23, 1942. The officials who had actual discretion to award the contract did not reach their conclusion to terminate negotiations with respondent until after

the routine notice of award had been forwarded without their knowledge, and the telegram of February 24, 1942, was sent in correction (R. 24). On March 5, 1942, the Navy followed up this telegram by mailing respondent a formal cancellation of the original letter of intent of December 29, 1941 (R. 20). No formal written contract was ever consummated. The present suit for alleged anticipatory breach of contract was instituted by respondent in the court below on June 21, 1944 (R. 1).

The Court of Claims held, first, that the notice of award (dated February 23, 1942) constituted a binding agreement, that the revoking telegram came too late, and that the Government had breached the agreement by cancelling it (R. 24–25). The court then proceeded to assess the damages attributable to this breach. It found that respondent had incurred no expenditures or expenses in reliance on the letter of intent or the notice of award of contract (R. 21, 26), but it concluded that "if the plaintiff had been permitted to perform its contract, it would have made a net profit of not less than $80,000." (R. 21, 26). This sum was reached by the court, avowedly acting as a jury (R. 26), on the basis of "about 4% of the gross contract price." (R. 26). Conceding that the respondent was "venturing into an untried field" and that it "would have had problems and difficulties that an active, going concern would not have had, and those difficulties

this contract would be profitable, for his decision. And in any case, such expectation is itself not evidence that the contract would in fact have been profitable. Similarly the fact that respondent's stockholders were, according to the court below, willing to finance performance, does not indicate that the contract would in fact have been profitable. Almost invariably, contractors expect contracts to be profitable, but such expectations all too frequently do not materialize. The period here involved was one of uncertainty so far as costs and profits in war contracts were concerned, and in many cases, it was impossible to tell, until completion of the contract, whether it would be profitable. Finally, there is no warrant in the record or in common knowledge to support the court's supposition that the Government's contracting officials would have shown such indulgence and aid that respondent would have emerged not only unmarred by default but possessed of a sizeable profit. In any case, the function of meting out this generosity has not been vested in the Court of Claims, whose jurisdiction is limited to awarding legal damages against the United States. *Smoot's Case*, 15 Wall. 36, 45–46.

II

A. The Government had the right to terminate respondent's contract without liability for unearned anticipated profits. Had a formal written contract been executed between respondent and the Navy Department, it probably would have

authorized the Government to terminate performance under the contract, without liability for unearned profits. The War Department had required the inclusion of a termination provision since September 1941, and the Navy Department similarly developed termination clauses late in 1941. The wording of these provisions varied from time to time but uniformly prohibited profits on uncompleted work. The existence of a right in the Government to terminate performance under the contract would wholly destroy respondent's demand for profits. At the least, the likelihood that the contract would have included such a termination clause adds a further speculative element to respondent's claim for unearned anticipated profits.

B. Any agreement which respondent made with the Navy was subject to the exercise of the wide and sweeping powers of modification conferred by Title II of the First War Powers Act as implemented by Executive Order No. 9001. By virtue of that Act, the Navy had the power to modify a contract "with or without consideration" and "irrespective of rights which may have accrued under the contract." Taken in its wartime context and considering past wartime experience, Title II must be construed as conferring the unilateral power on the part of the Government agency to terminate a contract without liability for unearned profits. The existence of the right to cancel, even though it is not availed of, is sufficient to bar recovery of prospective profits.

This construction of Title II accords with the other statutes of both World Wars dealing with the termination problem and closes the only gap in the deep-rooted and long-established policy against allowing war contractors to reap unearned profits. The discussion of the bill, which became Title II of the First War Powers Act, on the floor of Congress discloses an intention to remove various common law requirements which might hamper war procurement, including the requirement that a contractor must assent before his contract may be terminated without liability beyond his actual losses. Moreover, the Attorney General, in an opinion upholding the validity under Title II of bilateral terminations, plainly implies that unilateral action by the Government with respect to war contracts, including unilateral terminations, are also sanctioned.

It is difficult to say that the War and Navy Departments developed an administrative practice in regard to unilateral terminations. As far as they were concerned, that question was not of substantial practical importance since most contracts contained termination provisions and even in the absence of such a provision, the contractor almost invariably agreed to a settlement. So far as we are aware, the instant case is the only one in which the contractor sought to recover anticipated unearned profits on a terminated contract. Nor are the regulations and directives of the War and Navy Departments inconsistent with

our construction of Title II. The respondent's difficulty in regard to these documents is that it attempts to read these various documents, which uphold bilateral terminations, as holdings that bilateral action is the exclusive means of effectuating the termination of a contract.

ARGUMENT

In this case, the Court of Claims has awarded respondent a substantial sum for unearned anticipated profits as damages for breach by the Government of a war contract. This award was made, although as we show in Point I, the Court of Claims' own detailed findings conclusively demonstrate that respondent had suffered no damage and could not even have made proper and timely performance of its contract, let alone emerged from the venture profitably. Moreover, as we show in Point II, this gratuitous award has been allowed in the face of established statutory and administrative policy—in both World Wars—not to pay anticipated but unearned profits to contractors whose contracts were cancelled or terminated before completion. Accordingly, this case involves an unwarranted imposition of substantial damages upon the Government for the actions of its contracting officials which were proper in the circumstances and necessary in order to fulfill their responsibilities for the procurement of war supplies. It is for these reasons that the Government, believing that the decision below involved

so clear a departure by the Court of Claims from its proper functions as to warrant invocation of this Court's supervisory powers, sought review.

I

RESPONDENT WAS NOT ENTITLED TO ANTICIPATED PROFITS OF $80,000 AS DAMAGES FOR BREACH OF CONTRACT

The United States does not question in this Court the Court of Claims' holding that the notice of award sent by the Award Section of the Navy Department's Bureau of Supplies and Accounts created a binding contract between the United States and respondent on February 23, 1943 (R. 24).[3] For the purposes of this Point (see, *infra*, p. 35), it further accepts the finding that the Navy Department telegram received by respondent on February 24, the day following its receipt of the award, advising that the notice of

[3] The finding of the court below that a binding contract was consummated is, in our view, of doubtful soundness. Both during the trial and in its motion for a new trial in the court below, the United States urged that there was no contract between respondent and the Government inasmuch as there was no intent on the part of responsible naval officials to contract with respondent. That no contract was concluded has been the consistent view of the Navy Department in all its dealings with respondent in regard thereto. The Navy Judge Advocate General so held on June 16, 1942, on referral of the question to him at respondent's request, and respondent was so advised on July 17, 1942. The Navy Department War Contracts Relief Board on September 27, 1947, while this case was pending in the court below, denied respondent relief under the Act of August 7, 1946 (60 Stat. 902, *infra*, p. 46), on that ground.

award had been forwarded in error, constituted a breach of that contract (R. 25). There is no question here that the Court of Claims properly found that respondent incurred no expense or expenditure in reliance on the notice of award, and hence suffered no actual damage (R. 21, 25). The Government does urge, however, that the Court of Claims erred in finding that respondent would have made a profit of $80,000 and in awarding that amount as damages for loss of anticipated profits resulting from the breach of contract.

A. THE EVIDENTIARY FINDINGS DO NOT SUPPORT THE ULTIMATE DETERMINATION THAT RESPONDENT WOULD HAVE MADE A PROFIT OF NOT LESS THAN $80,000

1. It is established that the Court of Claims exercises "the functions of a jury in findings facts, equivalent to a special verdict, and with like effect." *Mahan* v. *United States,* 14 Wall. 109, 112; *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 539. Since a verdict cannot be sustained unless the findings extend to all material issues and include circumstantial facts sufficient to warrant the conclusion (*Chesapeake Insurance Co.* v. *Stark,* 6 Cranch 268, 273; *Prentice* v. *Zane's Administrator,* 8 How. 470, 484; *Barnes* v. *Williams,* 11 Wheat. 415), the Court of Claims' special findings must similarly support its conclusion. *Luckenbach S. S. Co.* v. *United States, supra; United States* v. *Smith,* 94 U. S. 214, 218; *Stone* v. *United States,* 164 U. S. 380, 382, 383; *United States* v. *Wells,* 283 U. S. 102, 120. Such support

may be drawn only from the special findings of fact; no aid may be sought from statements in the conclusions of law or the opinion. *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206; 303 U. S. 26, 28–29; *United States* v. *Seminole Nation*, 299 U. S. 417; *United States* v. *Pyne*, 313 U. S. 127, 130; *United States* v. *Causby*, 328 U. S. 256, 267; cf. Act of May 22, 1939, c. 140, 53 Stat. 752, formerly 28 U. S. C. 288. The judgment "may not be upheld as to any item that is not supported by definite findings of fact extending to all issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover." *United States* v. *Seminole Nation*, *supra*, at 422. A "deficiency in findings cannot be rectified by statements in the opinion." *United States* v. *Causby*, *supra*, at 267.

2. The evidentiary findings of the Court of Claims do not support its ultimate finding that if respondent had been permitted to undertake performance of the contract, it would have made a net profit of not less than $80,000 (R. 21).[*] The contract required respondent to begin delivering the gun mounts three months after the making of the award (by May, 1942), to produce and deliver at

[*] Although this ultimate finding is physically among the court's "Special Findings of Fact," it, of course, is not binding on this Court since, as we show in the text, it is inconsistent with the other facts found. *Hathaway & Co.* v. *United States*, 249 U. S. 460, 463. *United States* v. *Berdan Fire-Arms Co.*, 156 U. S. 552, 573.

least ten gun mounts within five months thereafter—two were to be delivered in May, 1942, three in June, 1942, and five in July, 1942—and to deliver at least ten a month until the full quota of 150 were delivered (R. 18). But the evidentiary findings conclusively disclose that respondent, if permitted to undertake performance, would have been unable to deliver as required, and probably would have incurred substantial loss.

As the Court of Claims found, "the construction of gun mounts is difficult and exacting work. Manufacturers experienced in somewhat similar work with large organizations and trained mechanics required from seven months to one year from the time of receiving notice to proceed until the first gun mounts were produced" (Fdg. 5, R. 19). Thus, even if respondent did have the experience, organization and the trained mechanics, it would not have been able to deliver gun mounts as required by the contract or to deliver the first gun mounts within three months of the award.

But, on the date of the award, respondent had no experience in the manufacture of gun mounts or in similar work. Respondent's previous work had been in fields far removed from the manufacture of gun mounts; it "had previously, for a time, been engaged in the manufacture of circular saws and had done work in connection with brake shoes and some other minor work" (Fdg. 2, R. 16). Nor did it have any

manufacturing organization capable of undertaking the work required by the contract (Fdg. 3, R. 19–20). Its executive officers in 1940 were engaged in other businesses in another city (Pittsburgh, Pennsylvania). There is nothing in the findings as to their qualifications or the qualifications of Mr. Johnson, who was engaged as assistant to the president in 1941 (Fdg. 3, R. 17). One officer and director, who was not a production expert, was engaged in the real estate business in Waynesboro, where the plant was located; "he had been the local manager of the plant when it was in operation, and continued to be its local manager and the statutory agent for the company thereafter" (Fdg. 2, R. 17). Mr. Kennedy, the proposed general manager (who was an engineer) was working elsewhere, as "a regular employee of another company" and was not actually hired until February 24, 1942, after the notice of award was received (Fdgs. 3, 5, R. 17, 20).

Similarly, respondent did not have any "force of trained personnel to train unskilled employees" (Fdg. 5, R. 20). Nor, for that matter, did respondent have any actual force of mechanics or workers, although it planned to use about 150 mechanics skilled, semi-skilled and unskilled in the machining and assembling of the gun mounts (Fdg. 5, R. 19). It "expected" to recruit its labor force from among former railroad shop mechanics in the vicinity (Fdg. 5, R. 19–20). No such recruiting had apparently taken place

even shortly before the award was received. When inspectors from the Navy Department's Philadelphia Inspection District visited the plant on January 16 and 17, 1942, "there was no one at the plant except the watchman and the local manager. No work at all was being performed at the time" (Fdg. 5, R. 19). And as late as February 19, 1942, four days before the award, when a WPB production specialist visited the plant, "only the watchman was at the plant. The production specialist inspected the plant with the local manager, who was called from his real estate office, and also talked with Mr. Johnson, who was called to Waynesboro for that purpose." (Fdg. 5, R. 19.)

Moreover, respondent's plant was in no shape forthwith to be used in the manufacture of gun mounts, in accordance with the award. The plant itself had been idle for some years; it had not been actively engaged since 1931, "since which time it has been used for minor engagements only, requiring not more than four or five employees" (Fdg. 2, R. 17). Certain plant expenditures had been made in 1940 and early 1941 in connection with respondent's endeavor to secure Navy work, but most of these were "in the nature of routine maintenance" and none involved equipment or material specifically pertinent to the instant contract (Fdg. 7, R. 21). In addition, respondent's "foundry was incapable of production of the cast steel forgings required for the gun mounts" (Fdg. 5, R. 19). And, although its plan was to subcon-

tract for these castings, as well as for other parts of the work, no such subcontracts had yet been made. All that respondent had done in regard to obtaining parts was to contact certain producers who were willing to furnish castings and other parts (Fdg. 5, R. 19). Thus, the Court of Claims stated, respondent, when it received the award, "was not prepared to undertake work of the character proposed by the contract, and would not for an indefinite time be prepared successfully to complete a contract for 150 gun mounts" (Fdg. 5, R. 19).[4]

These evidentiary findings compel, we submit, the conclusion that respondent could not have delivered two gun mounts in May, 1942, three months after the award, three gun mounts in the following month, five in the next month and thereafter ten monthly until 150 were delivered as required by the award. They leave the determination that respondent nevertheless "would have made a net profit of not less than $80,000" standing bereft of all factual support, plainly inconsistent with the "subordinate or circumstantial findings" and therefore not sustainable "in point of law."[5]

[4] In the light of the foregoing, it may well be doubted that respondent could have met the conditions required by the surety company before it would execute the performance bond which the Navy had definitely decided to require in this instance (R. 17–19, 20).

[5] On the basis of primary findings almost identical with those adopted below, the Commissioner of the Court of Claims rationally concluded that "the evidence does not establish that plaintiff could have successfully performed the contract nor made any profit thereon."

United States v. *Esnault-Pelterie*, 299 U. S. 201, 205–206; 303 U. S. 26, 31; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 540.

Assuming, as the Government does in this Point, contrary to respondent's impression (Br. in Opp. 11) that anticipated profits might be awarded a contractor for breach of a Government contract, respondent does not make out a case, on the special findings of the Court of Claims, justifying such recovery here. "The authorities both in the United States and England are agreed that, as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach." *Howard* v. *Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 205–206. Before recovery of anticipated profits may be allowed, the contractor must show by clear and direct proof that it would have complied with its contractual obligations and the result would have been a net gain which could fairly be estimated without speculation. *Howard* v. *Stillwell and Bierce Mfg. Co.*, 139 U. S. 199, 206; *United States* v. *Behan*, 110 U. S. 338, 344; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549; *White River Levee District* v. *McWilliams Dredging Co.*, 40 F. 2d 873, 876–877 (C. C. A. 8); *Dyal* v. *Wimbish*, 124 F. 2d 464, 467 (C. C. A. 5); *Polar Steamship Corp.* v. *Inland Overseas Steamship Corp.*, 136 F. 2d 835, 840–841 (C. C. A. 4), certiorari

denied, 320 U. S. 774; *Suburban Contracting Co. v. United States*, 76 C. Cls. 533, 544; American Law Institute, *Restatement of Contracts*, sec. 331.[6]

It should be noted that a basic prerequisite to recovery of anticipated profits is that the plaintiff be in a position to discharge fully his contractual obligation. In the present case, respondent has failed to show that it would have fully discharged its obligations within the time prescribed in the contract. On the contrary, the special findings explicitly state that it could not have so performed. And, in light of this inability to fulfill its contract, the question whether it would have earned a profit on the contract passes beyond the area of fair estimation into the realm of pure speculation. Cf. *White River Levee District* v. *McWilliams Dredging Co.*, 40 F. 2d 873, 876–877 (C. C. A. 6);[7]

[6] Other exceptions to the rule against the recovery of anticipated profits—clearly inapplicable here—are "where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." *Howard* v. *Stillwell and Bierce Mfg. Co.*, *supra*; *United States* v. *Behan*, *supra*.

[7] "The evidence falls short of 'that clear and direct proof which the law requires' of a future profit or of the amount thereof. One side of the evidence is that this contract required excavation of 80,000 cubic yards each month and completion, in thirty months, of the estimated 2,400,000 cubic yards of excavation; that at the end of fifteen months only 290,841 cubic yards had been excavated; that the new and only dredge on the work could not possibly complete the work in contract time; that the work, up to cancellation, had been at a loss. The other side of the evidence is that other

C. W. Henning & Co. v. *Suncrest Lumber Co.*, 51 F. 2d 945, 948–949 (C. C. A. 4); *Haddad* v. *Western Contracting Co.*, 76 F. Supp. 987, 990 (N. D. W. Va.). Indeed, the Court of Claims' special findings demonstrate that it is more probable that respondent would have suffered a substantial loss, rather than earned a 4% profit. Respondent was not experienced in the manufacture of gun mounts or similar work—it also was without an organization and trained staff—and even experienced concerns having the organization and staff, typically required substantially longer than three months—the period set by the award here—to deliver the first gun mounts. Cf. *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 559; *Greenwood County* v. *Duke Power Co.*, 107 F. 2d 484, 488 (C. C. A. 4).

B. THE OTHER FACTORS SET OUT IN THE OPINION ALONE CANNOT AND DO NOT SUPPORT THE JUDGMENT

Although "the deficiency in [its] findings cannot be rectified by statements in the opinion" (*United States* v. *Causby*, 328 U. S. 256, 267; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206; *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Pyne*, 313 U. S. 127, 130, see *supra*, pp. 19–20), the Court of Claims in its opinion, points to factual considerations, not re-

dredges could have been put to work, and that the profit on the work to be done would have been at the various figures put by several witnesses. In the face of the undisputed condition at the time of cancellation, we are not justified in assessing substantial damages upon the bare estimates as to future happenings." 40 F. 2d at 876–877.

flected in its findings as support for its judgment. But these considerations, (1) that Kennedy (the production manager) was willing to work for respondent at a "rather modest salary" with a 5% share in the profits (R. 25), (2) that the stockholders who did not ask for Government financing, "must have anticipated that the contract would produce a profit" (R. 25), and (3) that the Government treated defense contractors at this time with "consideration and tolerance" if they did their best to perform (R. 25), plainly provide only the flimsiest of foundations, especially in contrast to the impressive firmness of the detailed findings (*supra*, pp. 20–24) which the court brushed aside with the assertion that respondent "would have had problems and difficulties that an active, going concern, would not have had, and those difficulties would probably have adversely affected its profits" (R. 26). As we have already stated (*supra*, pp. 24, 27), these findings demonstrate not, as respondent suggests (Br. in Opp. 9), that the difficulties would reduce respondent's profits, but rather that respondent could not have rendered timely performance of its contract and that it was highly doubtful whether 150 gun mounts would ever have been produced even at a loss.

1. Kennedy's willingness to work for respondent for a "modest" salary with a 5% share in the profits affords no support for the court's judgment despite the court's edict that this "is sub-

stantial evidence that one expert who had studied the situation carefully anticipated that the performance would produce profits" (R. 25). There is nothing in the findings or opinion as to why Kennedy decided to leave his old position to work for respondent, or as to his previous salary. He may have been dissatisfied with his former position and, even if he were satisfied, there may well have been reasons other than the expectation that this contract would be profitable which influenced him to work for respondent. For instance, $1,000 a month (the "modest" salary respondent agreed to pay Kennedy) may have been more than he had been earning, even without the added 5% of the possible profits, and might alone have been the governing consideration. Furthermore, both respondent and Kennedy undoubtedly contemplated that respondent would be awarded additional war contracts as well, which over-all might have been profitable. In these highly speculative circumstances, the bare fact of Kennedy's acceptance of the position with respondent is no evidence that he expected that this particular contract would be profitable, much less that in fact it would be profitable.

2. The facts that respondent's stockholders were willing to finance performance, without asking for any advance from the Government,[8] and that

[8] It is to be noted here that the surety company would not give respondent a performance bond unless substantial additional working capital ($100,000 under Plan I and $200,000

they anticipated that the contract would be profitable, do not support the court's conclusion that, *ergo*, the contract would be profitable. This proposition proves too much; in virtually all instances where a person enters into a contract, he does so in the expectation or hope that it will be profitable, but it is commonplace that such expectations or hopes all too frequently do not materialize. Profit, by definition, is the compensation paid for the assumption of risk, and although competent businessmen, in entering upon a contract, hope to make a profit—the greater the risk, the higher the possible profit they will demand—they realize that they might nevertheless incur a loss. Indeed, the War Department's experience as of September, 1943, was that between six and seven percent of the contracting companies lost money on their war business. See Hearings before House Committee on Ways and Means on H. R. 2324, 2698, 3015, 78th Cong., 1st sess., p. 94. The greater proportion of these losses was in connection with, as in the present case, performance under the company's first war contract. See Fain and Watt, *War Procurement—A New Pattern in Contracts*, 44 Col. L. Rev. 127, 211–212.

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under Plan II) (*supra*, p. 5, fn. 1), was invested by respondent's controlling stockholders. There is nothing in the findings below which even suggest that respondent's stockholders were either willing or able to invest this additional money.

Moreover, the period here involved (late 1941 about the time of Pearl Harbor, and early 1942) was one of unusual uncertainty as far as costs and profits were concerned. As stated by General Somervill, Commanding General, Services of Supply, War Department (Hearings before Subcommittee of the Senate Committee on Appropriations on H. R. 6868, 77th Cong., 2d sess., p. 24):

> We are asking contractors to produce articles which have never been produced before. We are asking other contractors to produce articles which they have never produced before. We are asking still other contractors who have produced articles in small quantities, to produce them in vastly larger quantities. The result of this is that neither the contractors nor the contracting officers can make an accurate forecast of the cost of performance.
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> * * * * *
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> The plain fact of the matter is that in many cases it is impossible to tell, until completion of the contract, whether the contractor suffers a heavy loss, or makes a large profit.[9]

[9] This fluidity of the cost and profit situation in war contracts, at the time of respondent's award, makes manifest the essential weakness of the evidence which was adduced at the trial and with which respondent seeks to bolster the judgment below (Br. in Opp., pp. 6, 11–12). This evidence, respondent asserts, included "complete cost accounting data and engineering manufacturing estimates upon which the contract was negotiated" and shows, it claims, that it would have

See also, Affidavit of H. Struve Hensel, formerly Assistant Secretary of the Navy (included in transcripts of record in *Pownall* v. *United States*, 334 U. S. 742, October Term, 1947, No. 74, R. 104, 120–129, and *Alexander Wool Combing* v. *United States*, 334 U. S. 742, October Term, 1947, No. 95, R. 177, 187–193);[10] Marbury & Bowie, *Rene-*

made a net profit of from 8% to 10% of the contract price. In addition, that evidence was predicated on the theory that the contract would be fully performed on time, the fallacy of which is revealed by the court's findings of fact. In any case, such evidence is here irrelevant, for as we have shown (*supra*, pp. 19–20), the court's findings of fact alone may be looked to for support of the court's judgment.

Respondent's further effort to bolster the judgment below by relying on the finding below that a binding contract had been consummated as showing that the Navy Department (together with respondent) expected that the contract could be completed at a profit (Br. in Opp., p. 8), is likewise unsound. During this period, Navy personnel were more interested in getting munitions than in whether contractors earned a profit. See Hensel Affidavit (cited in the text (No. 74, p. 108; No. 95, p. 179)). This suggestion further ignores the fact that the contract, if any, was consummated not as a result of a decision of the responsible contracting officers, but because administrative machinery, having been set in action, inexorably ground out an award. That the responsible naval officials clearly were not certain that respondent would perform satisfactorily is evident from the requirement of a performance bond in this instance, from the prompt notification not to proceed, and from the instructions issued to respondent, contrary to the usual practice, not to incur any expenses in connection with the letter of intent (Fdg. 4, R. 18).

[10] This Court may properly take judicial notice of this affidavit as an official statement by an authorized representative of the Navy Department, contained in the records of the Court. Cf. *United States* v. *Pink*, 315 U. S. 203, 216.

gotiation and Procurement, 10 Law and Contemporary Problems 218, 219.

3. Finally, the court below attributes an extraordinary function to the Government's presumed "consideration and tolerance" for war and defense contractors. As counterbalances to its findings which, as we have shown, demonstrate that respondent could not have rendered timely performance of its contract and makes it highly doubtful whether the 150 gun mounts would ever be produced even at a loss (see, *supra*, p. 27), the court poses the singular, and unproved hypothesis that the Government's contracting officials would have shown such indulgence and aid that respondent would have emerged from its venture, not only unmarred by default but possessed of a sizeable profit. Nothing in the record or in common knowledge supports this supposition of unmeasured generosity." Even if this supposition were sustained by the finding or by the general knowledge of those times, the function of meting out that generosity has not been vested in the Court of Claims. That court has

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[11] The Navy Department Procurement Directive of July 7, 1943 (as amended) points out, in regard to modifications under Executive Order No. 9001 (*infra*, p. 42), that "carelessness and looseness on the part of the contractor * * * cannot be encouraged and overwhelming generosity to careless contractors, no matter how great the risk of inducing some lack of cooperation, will not facilitate the prosecution of the war." Navy Procurement Directives (Navy Department), par. 11,453.

jurisdiction to entertain suits against the Government for breach of contract, express or implied (28 U. S. C. 1491, formerly 28 U. S. C. 250), and it is established that an "implied contract" must be "one implied in fact and not one based merely on equitable considerations and implied in law." *United States* v. *Minnesota Investment Co.*, 271 U. S. 212, 217; *Goodyear Co.* v. *United States*, 276 U. S. 287, 293; *Sutton* v. *United States*, 256 U. S. 575, 581; *Merritt* v. *United States*, 267 U. S. 338, 341. Clearly, therefore, there is no warrant for elevating the Government's acts of grace in overlooking defaults and providing extra-contractual aids to the dignity or stature of a legal right, on the basis of which respondent may recover anticipated profits in the Court of Claims. In the very beginning of the history of the Court of Claims, this Court strongly warned against founding contract claims on the Government's "magnanimity and generosity." *Smoots Case*, 15 Wall. 36, 45–46. This Court there stated:

> There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the government, and to give to its actions under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the in-

> dividual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity coloring and even the closest legal argument. These are addressed in vain to this court * * *.
>
> It would be very dangerous, indeed, to the best interests of the government * * * if * * * that court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual.

II

THE GOVERNMENT HAD THE RIGHT TO TERMINATE RESPONDENT'S WAR CONTRACT WITHOUT LIABILITY FOR UNEARNED ANTICIPATED PROFITS

In Point I, we assumed that the Navy's telegram of February 24, 1942, advising respondent that the notice of award had been forwarded in error, constituted a breach of contract, for which respondent on a proper showing, which we have demonstrated was not made here (*supra*, pp. 20–27), would have been entitled to recover as damages full anticipated profits. We urge in this Point that under the contractual provisions then in common use by the Navy as well as under the applicable law, the Government had the right to terminate respondent's contract without liability for unearned profits.

A. HAD A FORMAL CONTRACT BEEN ISSUED THE RESPONDENT, IT WOULD PROBABLY HAVE AUTHORIZED THE GOVERNMENT TO TERMINATE WITHOUT LIABILITY FOR UNEARNED PROFITS

In this case, no formal written contract between respondent and the Navy Department, in regard to the subject matter here involved, was ever executed. All that happened here was that the Navy Department issued to respondent a letter of intent which did not permit respondent to incur any costs in reliance thereon, and thereafter it issued a notice of award which was immediately withdrawn before respondent took any action thereon. Had a formal written contract detailing the rights and liabilities of the parties been executed as is typically done in Government procurement and was here contemplated, it probably would have contained a provision authorizing the termination of the contract for the convenience of the Government. Under that provision, the Government would have been liable not for the full profits which respondent might have earned upon full performance but only for profits on the work actually performed. Of course, respondent would have been required to execute the formal contract when it was tendered as this was implicit in the negotiations leading up to the contract.

During most of World War II,[12] both the War and Navy Departments, two of the principal war

[12] The practice of inserting termination provisions in war and defense contracts did not originate in World War II. Many of the contracts entered into late in World War I con-

procurement agencies, required supply contracts as large as that awarded to respondent to include a termination clause permitting the Government to terminate performance at any time.[13] The wording of these clauses varied and they were often revised, but, from the beginning, their provisions were uniform in prohibiting profits on uncompleted work. Hearings before the House Committee on Military Affairs on H. R. 3022, 78th Cong., 1st sess., pp. 22–26 (termination provisions used by War Department early in World War II), 27–34 (termination provisions used by Navy Department early in World War II) 35–37,[14]

tained a provision reserving the right to terminate the contract for the convenience of the Government. The termination clause in the standard form contract adopted by the War Department in September 1918 provided, *inter alia*, that the contract could be cancelled in whole or in part and that no profits would be allowed on the cancelled portion of the contract. See Edwards, *Cancellation of War Contracts: Plans and Practice, 1918–1919*, United States Bureau of Labor Statistics, Division of Historical Studies of Wartime Problems (1945), pp. 5–6.

[13] The United States Maritime Commission, the third of the principal war procurement agencies, also has had clauses providing for the termination of contracts "ever since [its] program has been in effect." See Hearings before Subcommittee of the Senate Committee on Military Affairs on S. 1268, S. 1280, and S. J. Res. 80 ("Problems of Contract Termination"), 78th Cong., 1st Sess., pp. 190–191 (testimony of Lt. Commander W. S. Brown, Ass't General Counsel of the Maritime Commission); pp. 194–201 (typical termination provisions used).

[14] Mr. MARTIN: Do I understand * * * that anticipated profits are not allowed?

(Continued on p. 38)

43–46, 562; Uniform Termination Article for Fixed-Price Supply Contracts, 9 Fed. Reg. 478–480, 13400; Joint Termination Regulations (adopted by the War and Navy Departments, October 1944) secs. 533–533.4, 541–541.5, 9 Fed. Reg. 13361–2, secs. 45.533 *et seq.*; Office of Contract Settlement Regulation No. 7, 32 C. F. R. 1944 Supp. 8006, 3 (c) p. 8065;[15] see Malman, *Policies and Procedures for the Termination of War Contracts*, 10 Law and Contemporary Problems, 449, 452–459, 487–492. In 1941, the War Department, which had decentralized its procurement program, issued formal directives to its contracting officers located throughout the country requiring them to include a prescribed termination provision in all supply contracts, "except (a) contracts to be completed in six months or less for an amount less than $500,000 and (b) contracts for an amount less than $50,000, regardless of the date of completion" entered into after September

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Colonel CUTTER: Anticipated profits are not allowed, but a profit is allowed on so much of the work which is in process as has actually been done.

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The CHAIRMAN: No anticipated profit has been allowed on the termination of those contracts?

Colonel CUTTER: That has been the principle by which they have been guided. * * *

[15] "Profit should be limited to preparations made and work done for the terminated portion of the contract; but, subject to this limitation, any reasonable method of arriving at a fair profit may be used."

16, 1941.[16] War Department Procurement Regulation No. 3, par. 324.1; War Department Supply Contract Form No. 1; see Malman, *supra*, pp. 452–453; Goldman, *Termination of War Department Contracts at the Option of the Government*, 42 Michigan L. Rev. 733, 740.

The Navy Department similarly developed termination provisions and provided for their inclusion in lump sum contracts early in World War II. See House Hearings on H. R. 3022, *supra*, pp. 27–34. The Navy Department first developed "standard termination clauses for fixed price contracts * * * late in 1941 * * * [which clauses] in general form and substance have been inserted in most contracts entered into since that time except for shipconstruction contracts, which constitute a separate problem." Senate Hearings on S. 1268, S. 1280, and S. J. Res. 80, *supra*, pp. 553, 271 (letter from Acting Secretary of the Navy dated October 10, 1943); Hensel Affidavit, *supra*, p. 32 (R. 174, No. 74, October Term, 1947; R. 224, No. 95 October Term, 1947); Office of Contract Settlement, *A History of War Contract Termination and Settlements* (July, 1947), p. 1.[17] These ter-

[16] Originally, the termination provision was made mandatory in all lump sum supply contracts. But, on August 14, 1942, the rule was relaxed as stated in the text. The amount of the contract award here involved exceeded $2,000,000 (R. 20).

[17] Although as respondent points out (Br. in Opp., p. 16), the Navy first issued a formal directive in regard to the inser-

mination clauses reserved a right in the contracting officer to discontinue the contract whenever he determined that termination was "for the best interest of the Government." See House Hearings on H. R. 3022, *supra*, p. 27. And in the event of such cancellation, the termination clause provided that "the Navy would pay the contractor for all costs, including a proper allocation of overhead expenses to the contract, incurred up to the time of termination, plus an allowance of 6% or 7% profit on all such costs except purchases of materials and unfurnished goods, for which the contractor was reimbursed at cost. This provision differed from the clause then used by the Bureau of Ships and the Army, which calculated the profit on the estimated extent of completion of the contract—the contractor was paid a percentage of the total profit equal to the percentage of completion." Hensel Affidavit, *supra* (R. 177, No. 74; R. 227, No. 95).

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tion of termination clauses in 1944 (Navy Contract Termination Directive No. 1 of February 28, 1944, reproduced in Hearings before House Committee on Naval Affairs on H. R. 4469, 78th Cong., 2d sess., pp. 1492–1499), the Navy Department, unlike the War Department, had kept its procurement activities centralized in Washington, and, hence, most instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs who transmitted such instructions to the officers under them responsible for preparing contracts. House Hearings on H. R. 3022, *supra*, p. 29, (testimony of Mr. John Kenney, then Assistant Chief, Procurement Legal Division, Office of Under Secretary of the Navy); see Hensel affidavit, *supra*, p. 32, (R. 173, 174, No. 74; R. 224, No. 95).

It is probable, therefore, that respondent's formal written contract (which would have been entered into sometime after February 24, 1942) would have contained a termination provision, authorizing the Government to discontinue respondent's performance at any time for any reason. With such a provision, the Navy could have stopped performance because of dissatisfaction with respondent as a contractor, just as it actually did, without making the United States liable for anticipated but unearned profits. The existence of a right in the Government to terminate performance under the contract would wholly destroy respondent's demand for profits. At the least, the likelihood that respondent's contract would have expressly permitted such a termination adds a further speculative element to respondent's claim for unearned anticipated profits and further impairs respondent's already weak claim to have shown its loss of profits by the required "clear and direct proof." Of course, under the termination clause, respondent would recover any expenses incurred under the contract, but here no such expenses were shown.

B. INDEPENDENTLY OF CONTRACTUAL PROVISION, THE FIRST WAR POWERS ACT AUTHORIZED THE GOVERNMENT TO TERMINATE RESPONDENT'S CONTRACT WITHOUT LIABILITY FOR UNEARNED PROFITS

Regardless of contractual termination clauses, the Government's contracting officials were, we submit, statutorily authorized in February 1942 and thereafter to terminate respondent's perform-

ance without subjecting the United States to liability for anticipatory profits. Title II of the First War Powers Act (Act of December 18, 1941, c. 593, sec. 201, 55 Stat. 839, 50 U. S. C. App. 611) authorized the President, or his delegate "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate prosecution of the war." Executive Order No. 9001 (December 27, 1941, 6 Fed. Reg. 6787, 3 C. F. R. 1941 Supp., pp. 330–332), delegated this authority to the Navy Department, as well as the War Department and the Maritime Commission,[18] and specifically stated that "amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstance of the making of or the form of the contract amended or modified, of the amending or modifying con-

[18] The President, by other executive orders, delegated his powers under Title II to the various other agencies engaged in war procurement. See, *e. g.* Executive Orders Nos. 9023, 9269, 7 Fed. Reg. 302, 9265 (Treasury Department, Department of Agriculture, Federal Works Agency, National Advisory Committee for Aeronautics, Panama Canal and Government Printing Office); Executive Order 9055, 7 Fed. Reg. 964 (Department of Interior); Executive Order No. 9058, 7 Fed. Reg. 983 (Tennessee Valley Authority).

tract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof." Any agreement which respondent entered into with the Navy was subject to the exercise of the wide and sweeping powers of modification conferred by the statute and the Executive Order, including the power to modify the contract "with or without consideration" and "irrespective of rights which may have accrued under the contract." Taken in its wartime context and considering past wartime experiences, this must be construed as conferring the unilateral power on the part of the government agency to terminate the contract, obligating the United States to pay only for work done, disbursements made, and obligations incurred.

If the Government was authorized to cancel the contract by a termination provision in the formal agreement, or, as we now show, by Title II of the First War Powers Act, it is immaterial that the Navy did not at first seek to cancel or terminate performance but insisted that no contract had been consummated.[19] It is the substance of the Government's action rather than the form of words, which controls the issue of liability. In *College Point Boat Corp.* v. *United States*, 267 U. S. 12, 15–16, this Court refused to allow antici-

[19] The Navy's letter of March 5, 1942 (R. 20) constituted a cancellation of the letter of intent (dated December 29, 1941) and was clearly intended to terminate all contractual arrangements.

pated profits, as for a breach, where the United States did not purport to cancel the contract under the 1917 Act, but ordered a work stoppage which apparently constituted an anticipatory breach. There, the existence of the right to cancel, even though not availed of, was held sufficient to bar recovery of prospective gain. See, also, *Newark Sash & Door Co., Inc.* v. *United States*, 107 C. Cls. 606, 625.

1. The construction of Title II as conferring the power unilaterally to terminate a war contract without liability for anticipated profits is in accord with the other statutes dealing with the termination problem and closes the only gap in the deep-rooted and long-established policy against allowing war contractors to reap unearned profits. In World War I, this policy was reflected in the Act of June 15, 1917, 40 Stat. 182, and in the Dent Act of 1919 (40 Stat. 1272) which expressly barred award of "prospective or possible profits." The Act of June 15, 1917, empowered the President to "modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material" upon the payment of "just compensation." Both this Court and the Court of Claims has held that under that Act, the contract could be terminated unilaterally and that the contractor was not entitled to recover anticipated profits. *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 523–524; *Barrett Co.* v. *United States*, 272 U. S. 227, 235;

Meyer Scale & Hardware Co. v. *United States*, 57 C. Cls. 26, 50; *Hetrick Mfg. Co.* v. *United States*, 62 C. Cls. 265, 270. As stated in *Russell Motor Car Co.*, 261 U. S. at 523:

> The contract, we must assume, was entered into with the prospect of its cancellation in view, since the statute was binding and must be read into the contract. The possible loss of profits, therefore, must be regarded as within the contemplation of the parties.

The same rule was applied to war contracts made prior to the enactment of this Act, on the ground that they were necessarily subject to Congress' power to enact such legislation. *De Laval Co.* v. *United States*, 284 U. S. 61, 73.

In World War II, the termination provisions used by the war contracting agencies since late 1941 uniformly disallowed anticipated profits in terminated contracts. *Supra*, pp. 37–38. The same policy against unearned profits was embodied in the Contract Settlement Act (Act of July 1, 1944, 58 Stat. 649, 41 U. S. C. 101, *et seq.*), which Act, respondent concedes (Br. in Op., p. 22), permits unilateral termination. Section 6 (d) (5) of that Act required war contracting agencies to take into account, in settling terminated contracts, "such allowance for profit on the preparations made and work done for terminated portions of the war contract as is reasonble under the circumstances." And Regulation No. 7 of the Office of Contract Settlement pro-

vided: "Profit should be limited to preparations made and work done for the terminated portion of the contract * * *." 32 C. F. R., 1944 Supp., sec. 8006.3 (c), p. 3065. Similarly, the Act of August 7, 1946, c. 864, 60 Stat. 902, authorizing the departments and agencies "to consider, adjust, and settle equitable claims of contractors," limited the amount of the claim which could be so adjusted to "losses (not including diminution of anticipated profits) incurred * * *." As summarized by the Office of Contract Settlement, "The policy of the Government forbade the allowance of profit on that part of a canceled commitment on which no expenditures had been made and no work had been done. Industry and Government generally agreed that on termination the contractor should not receive the entire profit which he would have realized from performing the terminated portion, but rather that his profit allowance should be reasonable in relation to the work done and preparation made on the terminated portion of the contract up to the date of termination." Office of Contract Settlement, *A History of War Contract Terminations and Settlements* (July 1947), p. 27. Thus, unless Title II authorized unilateral termination, the United States would, contrary to this deep-rooted legislative and administrative policy, be liable for unearned profits in terminating a war contract.

2. That Title II was sufficiently broad in scope to permit such termination without lia-

bility for unearned profit is clear from its legislative history. The House Report (H. Rep. 1507, 77th Cong., 1st sess., p. 2), states that Title II "empowers the President, whenever he deems such action would facilitate the prosecution of the war, to authorize agencies to enter contracts with a maximum of speed"; and that it "liberalizes existing statutes relating to procurement and permits elimination of restrictions so as to give the procurement agencies the flexibility they need in the procurement of war matériel."

The debates on the floor of Congress similarly stressed the scope of the powers which Title II vested in the President. Several members of the House Committee referred to Title II as "new," "far-reaching," the "vital part" giving "great power," and taking "the lid off entirely." 87 Cong. Rec. 9838–9844. In the Senate, Senator Taft acknowledged that the "language is so clear that there can be * * * not the slightest doubt that this does change the contract laws as well as merely the procedure of making contracts." 87 Cong. Rec. 9839. Senator Vandenberg commented that Title II was "a complete, blanket authority to the President * * * to authorize any department to do anything it pleases in respect to war contracts * * * and at any price." 87 Cong. Rec. 9842. Senator Van Nuys (Chairman of the Senate Committee) said that it "goes beyond the power granted to President Wilson." 87 Cong. Rec. 9838. "The

object," said Senator Barkley, "is to give the departments or the President * * * more flexibility not only in making contracts but in the necessary modification of them if it becomes necessary to modify them in the interest of the Government or in the interest of national defense." 87 Cong. Rec. 9840. Senator Danaher, a member of the Senate Committee, said "our whole effort was designed * * * to provide for the modification of contracts whenever the President deems such action will facilitate the prosecution of the war." 87 Cong. Rec. 9839.[20] In view of these statements as to the breadth of the powers vested in the President by Title II, that Title may, we believe, reasonably be construed to eliminate the common-law requirements as to the contractor's assent before the contract may be terminated, and hence to authorize the President, or his delegate, unilaterally to terminate performance under a contract in the interest of national defense conditioned only on the payment of actual losses incurred by the contractor.

3. The Attorney General's interpretation of the broad and liberal grant contained in Title II, as extending the dispensing power not only to statu-

[20] For more detailed resumes of the legislative history, see 40 Op. Atty. Gen. No. 53, August 29, 1942: Kramer, *Extraordinary Relief for War Contractors*, 93 U. of Pa. L. Rev. 357; Rowley, *The First War Power Act Cases* (appearing in Shepherd, *Cases and Materials on the Law of Contracts* (2d Ed. 1946), pp. 1233–1238. Fain and Watt, *War Procurement, A New Pattern In Contracts*, 44 Col. L. Rev. 127, 194, *et seq.*

tory contracting requirements but also to common-law principles of contract law such as those involving consideration, envisages the grant as including the power unilaterally to terminate contracts without liability for anticipated profits. 40 Op. Atty. Gen. No. 53, August 1942. That opinion was issued in response to an inquiry from the Secretary of War as to the propriety, under Title II, of certain actions he proposed to take. He proposed, *inter alia*, to issue an order in regard to the amendment and modification of contracts, which read in part: "Whenever, in the judgment of the Commanding General, Services of Supply * * * the prosecution of the war is thereby facilitated, [he shall have power] to amend or modify contracts heretofore or hereafter made for the purpose of * * * (c) protecting contractors from the consequences of unforeseen or unexpected events, (d) adjusting contracts to new conditions and circumstances, including those created by the rules, orders, instructions, and determinations of Government departments, or (e) for any other purpose for facilitating the prosecution of the war." In holding that such an order was within the scope of Title II, the Attorney General commented (p. 9):

> In passing the First War Powers Act, the Congress desired to enable you, and the contractors who supply you with war materiel, to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by

changes in weapons, in strategy, in the economy, in the availability of commodities, and other variables. The extreme scope of the power given by Title II to "modify" and "amend" was explicitly recognized in the debate in the Senate. (See Cong. Rec. v. 87, p. 9839) Title II must be given an interpretation which will carry out the obvious intention of its framers.

In particular, the language of the act respecting "amendments or modification of contracts * * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts," would be largely meaningless if it did not include the power to settle claims and release obligations in favor or against the United States arising either in connection with the original contract or as a result of a modification or amendment thereof.

The broad grounding of the opinion of the Attorney General, in which he gives effect to the "extreme scope of the power given by Title II to 'modify' or 'amend' " and holds that the War Department may adjust contracts to new conditions and circumstances; may modify or amend contracts "for any other purpose for facilitating the prosecution of the war," and may release obligations in favor of or against the United States, must be taken as affirmative support for the validity of unilateral action of the Government in respect to war contracts and, specifically, in so far as the pres-

ent case is concerned, unilateral action with regard to their termination.[21]

4. The administrative practice does not, as respondent suggests (Br. in Opp., p. 17), refute the existence of the power to terminate contracts where the contractor is unwilling to countenance cancellation. So far as the service agencies were concerned, there were few, if any, occasions warranting the invocation of such power and hence the question whether a contract could unilaterally be terminated without subjecting the Government to liability for anticipated profits was not of substantial practical importance. As we have already stated, the War Department had, since September 1941, required the inclusion of a termination provision in its contracts, and the Navy Department early in the war similarly included such a provision. *Supra*, pp. 36–38. Thus, in comparison to the total volume of contracts, the

[21] Respondent's reliance on the Attorney General's opinion (Br. in Opp., pp. 17–18), is, we suggest, misplaced for, although, as respondent points out, the Attorney General did hold that Title II encompassed bilateral action in terminating contracts, he does not hold that bilateral action was a prerequisite for the termination of a contract.

To further buttress its position that bilateral action is required under Title II, respondent refers to a memorandum submitted by the Attorney General to the Subcommittee of the Senate Committee on Military Affairs on S. 1268, S. 1280 and S. J. Res. 80 (See Hearings before that subcommittee, 78th Cong., 1st sess., p. 529) (Br. in Opp., pp. 19–20). That memorandum was in response to a request by the Chairman of the Subcommittee for an analysis of the common-law rights of a contractor whose contract had been terminated (Hear-

contracts without termination provisions were relatively few in number, and many of these contracts were subsequently amended to include termination provisions. Moreover, even when contracts without termination provisions were terminated, contractors usually were willing to negotiate a settlement, the settlement negotiations frequently being conducted against the background of the award of other contracts. The instant case is the only one of which we are aware in which the contractor seeks to recover the full anticipated unearned profits on a terminated contract. In these circumstances, it is difficult to say that the service departments developed an administrative practice contrary to our position here.

The official regulations and directives of the War and Navy Departments, as we show, *infra*, pp. 53–57, may reasonably be read to support the construction of Title II we have urged. At the very least, these documents are not, as respondent contends (Br. in Opp., pp. 17–23), opposed to our position. While these documents are concerned primarily with bilateral terminations and uphold their propriety, they do not purport to outlaw unilateral terminations. The vulnerability of re-

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ings, pp. 521–522), and the Attorney General's memorandum, as the title to that portion of the memorandum indicates, was limited to an analysis of such common law rights. Neither the request nor the answering memorandum dealt with the question of unilateral termination under the First War Powers Act.

spondent's position is that it attempts to read into these various documents, construing Title II as permitting bilateral termination, holdings that bilateral action is the exclusive means of effectuating the termination of a contract. In any case, these directives and regulations are not entitled to the usual weight accorded such pronouncements of policy in so far as they formulate a position as to unilateral termination, since there have been few, if any occasions to put these policies into practice.

The Judge Advocate General of the Army, following the Attorney General's opinion, has held that Title II authorized the termination of war contracts not containing a termination article. Opinion of the Judge Advocate General of the Army, SPJGC 164, September 16, 1942, digested in 1 Bull. JAG No. 5, pp. 304–305. In the digest of that opinion, which respondent quotes (Br. in Opp., p. 18) and from which it infers that bilateral action is a prerequisite to the termination of a contract not containing a termination provision, the Judge Advocate holds that, under Title II, contracts without a termination clause may be terminated by negotiated supplemental agreements. As appears from the opinion itself, the specific question raised was whether such termination could be settled by a supplemental agreement, and all that the Judge Advocate held was that such agreements are authorized by Title II. The rationale of this opinion would extend to the

situation where no supplemental agreement was negotiated subsequent to the unilateral termination, for the Judge Advocate holds, referring to an earlier opinion (SPJGC 160, July 3, 1942):

> The First War Powers Act, 1941, has for its purpose the winning of the war. It is not a statute motivated by social, economic or political ideologies, but a statute to prosecute a relentless, all-out war of self preservation. The intent of Congress to give the President every power he would require to procure war supplies and matériel, without the burdensome restrictions of peacetime procurement to hamper him, is clearly and simply indicated in the language of the act * * *."

Such an approach clearly contemplates, we suggest, that Title II embraces unilateral termination of a contract to facilitate procurement of

[22] Respondent's statement that the Judge Advocate's opinion quotes from an opinion of the Comptroller General to the effect that a termination settlement would be honored only where the original contracts were so amended by agreement (Br. in Opp., pp. 18–19), misreads that quotation. In the opinion cited (5 Comp. Gen. 450, 455), the Comptroller General held that the contracting officers of the administrative agencies did not have final authority to adjust and settle claims arising under contracts. And, as the Judge Advocate points out, that decision antedated the First War Powers Act. It is interesting to note that upon the enactment of the First War Powers Act, the Comptroller General clearly stated that the war agencies had the authority to terminate contracts, but contended that the settlement agreements should be subject to his pre-audit. See, *e. g.*, Hearings before House Committee on Naval Affairs, on H. R. 4469, 78th Cong., 2d sess., p. 1657; Hearings before House Committee on Military

war materials whether or not a supplemental agreement is negotiated.

This interpretation of the Judge Advocate General's opinion accords with the approach advanced in the War Department Text, *Government Contracts and Readjustment* (J. A. G. S. Text No. 12) (issued on May 1, 1945 for use as a training manual for J. A. G. officers), pp. 178–179 and fn. 50; 159–160, fn. 1. It is there stated (pp. 178–179):

> A fixed price supply contract which contains no termination article may nevertheless be terminated for the convenience or at the option of the Government. An agreement may be made with the contractor for termination and settlement of the contract in terms consistent with the best interests of the Government. If no such agreement can be concluded, the contract may be terminated and a unilateral determination made of the amount due. * * *

And in footnote 50 (at pp. 178–179), it is commented:

> Under principles applied by the courts in the construction of war statutes similar to the Contract Settlement Act, it would appear that war contracts entered into after adoption of the Act contain an implied condition that such contracts may be

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Affairs, on H. R. 3022, 78th Cong., 1st sess., p. 201. To make it clear that such pre-audit was not to be required was one of the objectives of the Contract Settlement Act. See *infra*, p. 56, fn. 23.

> terminated upon payment of fair compensation as defined in the Act. * * * This principle would seem to eliminate recovery of anticipated profits on work not done even where such a contract does not contain a termination article.

This text, being published after the enactment of the Contract Settlement Act, naturally confined its instructions to prospective JAG officers to the operation of that Act. But that statute was not enacted, as respondent suggests (Br. in Opp., pp. 22–23) for the purpose of authorizing the Government to terminate contracts unilaterally (see Sen. Rep. No. 836, 78th Cong., 2d sess., pp. 1–2; Hearings before Subcommittee of the House Committee on the Judiciary on H. R. 4789 and S. 1718, 78th Cong., 2d sess., pp. 34–35).[23] It does not enlarge the authority of the service departments *vis-à-vis* the contractors in that respect, but rather deals with the procedure to be followed once a contract is terminated. Hence to the same extent that under the Contract Settlement Act the Government had the power unilaterally to terminate contracts, as respondent concedes (Br. in Opp., pp. 22–23), such unilateral termination would

[23] The primary objectives of the Contract Settlement Act, as stated in Section 1 of the Act, were to secure uniformity in termination procedure, to provide a speedy method of settling termination claims, to facilitate reconversion to peacetime production, and to make it clear that the Comptroller General was not to pre-audit termination settlements.

appear to be similarly authorized under Title II of the First War Powers Act.[24]

Of the Navy Procurement Directives referred to by respondent (Br. in Opp., p. 19), those of July 7, 1943, and of December 15, 1944, although they deal with contract amendment and modifications under Title II, do not relate to the termination of contracts as such whether by unilateral or bilateral action. See Navy Procurement Directives, Part IV, par. 11,441 *et seq.* The remaining directive, that of September 16, 1942 (*id.*, par. 11,401, *et seq.*), does deal with contract termination and includes the comment:

> All contentions or proposals of contractors or of the Navy Department which cannot be disposed of in accordance with the express or implied provisions of a Navy contract * * * must be disposed of, if at all, through the exercise of powers (which are ample) conferred under the First War

[24] In regard to the War Department's interpretation of Title II, respondent also refers (Br. in Opp., p. 22) to Mr. Malman's article (*supra*, p. 38) in which he paraphrases Procurement Regulation 15, and from which he concludes that where a contract does not contain a termination article, and no satisfactory termination agreement can be reached with the contractor, an order to discontinue further performance is recognized by the War Department as a breach of contract. A careful reading of the relevant provisions of that regulation (see Hearings before the House Committee on Military Affairs on H. R. 3022, 78th Cong., 1st sess., p. 535) indicates that Mr. Malman's conclusion is of doubtful validity.

Powers Act and Executive Order No. 9001. [Par. 11,401]

This language, we believe, supports our view, rather than respondent's, as to the scope of the powers granted by the First War Powers Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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